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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 – 12th Street, S.W.
Suite TW-A325
Washington, D.C. 20554

*Re: BitWise Communications, Inc. a/k/a OmniLEC
(499 Filer ID # 822650)
CC Docket No. 96-45
WC Docket No. 06-122
Appeal of USAC Decision*

Dear Ms. Dortch:

BitWise Communications, Inc. a/k/a OmniLEC ("BitWise"), through undersigned counsel, hereby files this appeal of three (3) decisions by the Universal Service Administrative Company ("USAC") to reject BitWise's revisions to its 2006, 2007 and 2008 FCC Forms 499-A Telecommunications Reporting Worksheets ("Forms 499-A").

BitWise is a small company providing resold and facilities-based local exchange telephone services in Peoria, Illinois and surrounding areas. In addition to its local services, BitWise provides a very small amount of long distance service to its customers. BitWise derives the vast majority of its revenue from the provision of its local intrastate service.

As a small service provider with extremely limited financial and personnel resources, BitWise's management entrusted the preparation of its 2006 through 2008 Form 499-As to the same employee tasked with maintaining the company's billing records, handling billing disputes with suppliers, and who also served as the company's customer care "department." In other words, as is the case with many small competitive telecommunications providers, BitWise

was simply overwhelmed and understaffed, and generally lacking in sophistication with respect to the complexities of USAC's instructions and Form 499 reporting. Due to its inexperience, lack of expertise, and inability to afford the services of a professional steeped in telecommunications regulatory matters, BitWise innocently transcribed its **total company revenue** in the interstate revenue column (including intrastate telecommunications and non-telecommunications revenue) of Line 423 of its 2006, 2007 and 2008 Forms 499-A. Line 423, however, represents a filer's total universal service contribution base revenues (*i.e.* those derived from interstate telecommunications services only). Due to this scrivener's error, which went unnoticed by management until a recent audit, BitWise grossly overstated its 2005–2007 USF-eligible revenues. These patently obvious scrivener's errors were not caught by USAC and no one at USAC notified BitWise of its mistakes. Instead, USAC processed the mistakenly reported total company revenue, which has since resulted in crippling Universal Service Fund ("USF"), Telecommunications Relay Services Fund ("TRS"), Annual FCC Regulatory Fees, North American Numbering Plan and Local Number Portability charges that greatly exceeded the amount it actually owes under applicable FCC regulations. BitWise's inadvertent, innocent mistakes, which should have been identified by USAC before processing, have resulted in invoiced USF contributions which exceed, by a multiple of 13, the amount owed on actual interstate revenue. *See Exhibit J*, attached hereto (Chart comparing BitWise's estimated FCC program obligations as between its original and revised Form 499-As).

BitWise only recently learned of the problems with its Forms 499-A. As soon as BitWise discovered the errors, it took swift corrective measures. BitWise diligently reviewed its past Form 499 filings through an internal audit and then scraped up sufficient resources to retain the advice of counsel on how to proceed. Thereafter, BitWise prepared revised filings alerting USAC to the inadvertent mistakes (see exhibits C, F & I).

USAC's revision rejection letters do little more than repeat its rule that revisions to a Form 499-A must be filed within one year of the Form's original due date (see Exhibits A, D & G). As it specifically pertains to BitWise's revised 2008 Form 499-A, however, USAC's decision is erroneous **on its face** and is completely without justification.

The original due date for BitWise's 2008 Form 499-A was April 1, 2008. BitWise filed its revised 2008 Form 499-A, signed by an officer, on March 27, 2009. Even if the Pony Express delivered the revised 2008 Form 499-A from Peoria to Washington, D.C., the filing would have arrived before or on April 1, 2009 (*i.e.*, within the one-year time limit for downward revisions). USAC, therefore, has no legitimate or credible basis for refusing to accept BitWise's revised 2008 Form 499-A filing. The Commission should spare no time and instruct USAC to accept BitWise's revised 2008 Form 499-A as timely filed and order such other relief as is necessary to relieve BitWise of the consequences of USAC's clear mistake.

By itself, taking this action would result in a reduction of BitWise's invoiced USF contributions by nearly \$100,000 and save BitWise close to \$110,000 in total FCC program fees. In addition, to the extent "debts" arising from USAC's illegitimate refusal to accept BitWise's

timely-filed revised 2008 Form 499-A have been referred to the U.S. Treasury and late fees, penalties, and interest charges have been added to the approximately \$110,000 in unlawful charges, these too should be removed and the U.S. Treasury must be informed to correct its records accordingly. Of the \$281,866.39 in alleged debts which have been referred to the U.S. Treasury, BitWise estimates that at least \$150,000 arises from USAC's inexplicable rejection of the company's timely-filed revision to its 2008 Form 499-A. See Exhibit J for details.

With respect to BitWise's revised 2007 Form 499-A, the Commission cannot uphold USAC's rejection because enforcing payment of USF contributions calculated on BitWise's "mistakes" would result in contributions that exceed BitWise's annual revenue from interstate telecommunications. Such a result violates established judicial precedent. See *Texas Office of the Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("TOPUC").¹ In the TOPUC case, the U.S. Court of Appeals for the Fifth Circuit ("5th Circuit") stated unequivocally that a USF contribution amount that exceeds a contributor's interstate revenues, *on that basis alone*, violates Section 254's requirement that carriers contribute to the USF "on an equitable and non-discriminatory basis."² Based upon an average of the quarterly contribution factors, BitWise's contribution obligation on its revenues as calculated in its original 2007 Form 499-A would amount to \$74,345, far exceeding its actual interstate revenues of \$56,692³ — the exact situation forbidden by the 5th Circuit. Thus, its holding in the TOPUC case compels the Commission to reverse USAC's decision rejecting BitWise's revised 2007 Form 499-A.

Although the FCC is bound to reverse USAC's rejection due to the fact it was timely-filed, as previously addressed herein, there is further compelling reasons for an FCC reversal. Indeed, the circumstances of BitWise's revised 2008 Form 499-A present a similar situation to that of its revised 2007 Form 499-A. Based upon an average of the quarterly contribution factors for the year, BitWise's contribution obligation on its revenues as calculated in its original 2008 Form 499-A would amount to approximately \$113,698. This amount, while not in excess, is nearly as much as BitWise's \$139,416 in actual revenue from interstate telecommunications. This result is clearly inequitable, and therefore in violation of the principles of TOPUC. The 5th Circuit's decision compels the Commission to step in and act when USAC's actions — either deliberately or merely by processing the reported revenue figures — compel a company to contribute to the USF a sum nearly equal to its total annual revenues from interstate telecommunications. The Commission should therefore reverse USAC's decision on multiple grounds.

¹ See also 47 U.S.C. § 254(d).

² See *id* at 434-435 ("[Petitioner]'s attack boils down to the argument that it is being unfairly treated because it will be forced to pay more in universal service contributions than it can generate in interstate revenues. It makes a compelling argument that this result alone violates the equitable language of [Section 254]").

³ See Exhibit J.

Furthermore, USAC exceeded the scope of its authority in assessing contributions based upon BitWise's original 2007 Form 499-A. BitWise inadvertently left Line 423 (the sum of the mistakenly transcribed interstate revenues) completely blank. Without verifying the numbers reported in blocks three and four (which, as stated, were erroneous), USAC simply totaled these revenue amount to arrive at a sum it then used as BitWise's USF contribution base. USAC has absolutely no authority under applicable FCC regulations to "complete" an otherwise "incomplete" and obviously error-filled Form 499-A. For all these reasons, the FCC should act quickly to correct USAC's compounding of BitWise's scrivener's errors.

Finally, USAC's rejection of BitWise's 2006 Form 499-A was improper. USAC failed to catch and provide notice to BitWise of a variety of patently obvious mistakes throughout its original 2006 Form 499-A. Instead, USAC flippantly cast aside any duty to act as a responsible agent of the Commission and proceeded to process the erroneous Form as if true and accurate.

Without relief, BitWise will continue to accrue unlawful and inequitable FCC program assessments, penalties, late fees, and mounting interest charges. Innocent mistakes by a small, undermanned, and ill-funded competitive local exchange carrier will result in irreparable and excessive harm, if not promptly rectified by the Commission. The fees, and now "debts," arising from these scrivener's errors, and USAC's perpetuation thereof, will cause irreversible damage to BitWise, and would likely force the company to cease providing services to its customers.

Granting BitWise's requests is clearly in the public's interest. Recently, the Commission has granted similar requests for relief where "strict enforcement of the filing deadline would disproportionately penalize [the carrier] when considered in light of its actions to remedy the error." As previously discussed, BitWise took corrective action immediately upon discovering the filing error. First, BitWise diligently reviewed its filings. Second, it sought the advice of counsel. Third, it instituted measures to prevent such errors from occurring in the future (by retaining counsel and subscribing to compliance services offered by our law firm). BitWise no longer employs the individual responsible for the scrivener's errors and now conducts training to inform its employees about the Form 499 reporting process, so as to avoid future mistakes. Lastly, BitWise is preparing a comprehensive compliance manual and deploying internal controls that will make its prospective Form 499 reporting accurate and fully compliant.

For the foregoing reasons, BitWise respectfully requests that the Commission waive USAC's requirement that revisions to its 2006 and 2007 Form 499-As be filed within one year of the original due date and declare USAC's refusal to accept BitWise's revised 2006 and 2007 Forms 499-A invalid. BitWise further requests that the FCC immediately instruct USAC to accept BitWise's revised 2008 Form 499-A as timely filed.

Finally, BitWise requests a waiver of the rules requiring contributors to first dispute USAC's rulings with USAC. The FCC's rules mandate a contributor first address its disputes

regarding contribution obligations to USAC in the form of an appeal.⁴ The Commission may grant a waiver of its rules or policies if the purpose of the rules would be frustrated by application of the rules to the instant case or that application of the rules would be inequitable, unduly burdensome, contrary to the public interest, or the applicant has no reasonable alternative.⁵ Because USAC's decision violates the FCC's rules and judicial precedent, justice can only be served by waiving the need to first appeal USAC's rejection of BitWise's Forms 499-A to USAC, the very entity that necessitated this filing. Requiring an appeal to USAC would only delay the process as an initial appeal to USAC would prove futile.

To the extent you have any questions concerning this filing, please contact the undersigned.

Respectfully submitted,

/s/

Jonathan S. Marashlian

Enclosures

⁴ See USAC Rules of Appeal, available at:
<http://www.usac.org/fund-administration/contributors/file-appeal/>

⁵ *Id.*